PHILLIPS PETROLEUM CO.
v.
MELVIN BRADSHAW ET AL.

IBLA 81-727 Decided August 17, 1982

Appeal from a decision of Utah State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void for failure to respond properly to a contest complaint. Contest Utah 10765.

Affirmed, as modified.

1. Contests: Generally--Mining Claims: Contests--Rules of Practice: Private Contests

It is proper to declare unpatented mining claims null and void without a hearing where the answer in a private contest complaint was not filed in accordance with the requirements set out in 43 CFR 4.450-6.

APPEARANCES: Melvin Bradshaw, pro se; Robert P. Hill, Esq., Salt Lake City, Utah, for Phillips Petroleum Company.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Melvin Bradshaw and Drucilla Bradshaw appeal from the Utah State Office, Bureau of Land Management (BLM), decision of May 7, 1981, which declared certain unpatented mining claims, millsites, and a tunnel site claim 1/ null and void pursuant to private contest Utah 10765, filed by Phillips Petroleum Company. 2/

1/ The claims involved in the contest complaint are Dru's Cedar Nos. 1 through 6, U MC 182382 through U MC 182387, Dru's Mill Site Nos. 1 through 8, U MC 183388 through U MC 182393; and Tunnel Site, U MC 182394. The claims are situated in SW 1/4 SE 1/4 sec. 33, S 1/2 SW 1/4 sec. 34 T. 26 S., R 9 W., Salt Lake meridian; and lots 3, 4 sec. 3, lot 1 sec. 4, T. 27 S., R. 9 W.

2/ The Board has consistently ruled that one with an interest in the surface estate has standing to bring a private contest against a mineral entryman. See Sedgwick v. Parker, 27 IBLA 256 (1976); City of Phoenix v. Reeves, 14 IBLA 315, 81 I.D. 65 (1974), aff'd, Reeves v. Morton, Civ. No. 74-117 PHX-WPC

In its complaint filed September 12, 1980, Phillips alleged generally that the mining claims did not have within their boundaries a discovery of a valuable mineral deposit, that the millsites have not been used for milling purposes and have no reduction works on any of them, and that the tunnel site claim has had no work commenced on the driving of a tunnel. The complaint was served on the contestees September 15, 1980.

The pertinent regulation, 43 CFR 4.450-6, requires that an answer to a contest complaint be filed within 30 days after service in the office where the contest is pending, together with proof of service of the answer upon the contestant. The answer of contestees, due in BLM October 15, 1980, was actually received by BLM October 20, 1980, and was not accompanied by proof of service of the answer upon the contestant. There is no evidence in the file that a copy of the answer has ever been served upon the contestant.

The BLM decision did not address the question of the late filing of the answer, but considered the answer as not specifically responding to the charges in the complaint, and failing thereby to comply with 43 CFR 4.450-6. Accordingly, BLM declared that the charges were taken as admitted and that the claims were declared null and void, pursuant to 43 CFR 4.450-7(a).

Appellants state that the answer to the contest complaint was mailed October 8, 1980, and on appeal they submitted a copy of an instrument bearing that date. However, the answer received by BLM on October 20, 1980, bears the date of October 13, 1980, as to both the contestee's signature and the notarization. This obvious discrepancy makes all of contestee's statements suspect.

The regulation, 43 CFR 4.401, allows a grace period of 10 days if the answer was transmitted or probably transmitted within the 30 days following service of the contest complaint; that is, by October 15, 1980. Inexplicably, the envelope in which the answer was transmitted is not in the case file, so the actual date of mailing cannot now be determined. However, since the answer shows that it was signed and notarized in Delta, Utah, it presumably was mailed from that city to BLM in Salt Lake City.

Information from the Postmaster, Salt Lake City, Utah, is to the effect that mail deposited in the Post Office at Delta, Utah, before 5 p.m. on weekdays, is trucked to Salt Lake City, with normal arrival time about 11:30 p.m., the same day. The mail is worked the next day and is available for delivery the following morning. Thus, if the answer had been mailed from Delta by

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fn. 2 (continued)
(D. Ariz. Aug. 9, 1974), recon. denied (Sept. 24, 1974)); Thomas v. DeVilbiss, 10 IBLA 56 (1973), aff'd, Thomas v. Andrus, 552 F.2d 871 (9th Cir. 1977). Phillips Petroleum Company is the holder of geothermal resources lease U 27386 issued Oct. 1, 1974, after a competitive lease sale by BLM. The lease has a primary term of 10 years. The land included in the contested claims lies within the leasehold of Phillips. Phillips is thus qualified to bring this private contest.

5 p.m., October 15, 1980, it normally would have been delivered to BLM no later than October 17. The actual delivery of the answer on October 20 indicates that it was not mailed during the 30-day period following service of the complaint September 15, 1980.

Furthermore, at no time has appellant explained why he did not serve a copy of the answer upon the contestant's attorney, as required by the regulations.

The BLM decision stated the answer did not address specifically the allegations in the complaint. Where the answer to a mining contest can reasonably be construed as a general denial of the allegations contained in the complaint, the response will be considered a sufficient answer within the contemplation of the regulations. United States v. Libby, 24 IBLA 39 (1976). Here the answer states "the Claimee [contestee] denies all of the allegations of the claimants [contestants] not specifically admitted or denied." This language is acceptable as an answer to a contest complaint.

Accordingly, as appellant has not proved that the answer was transmitted during the 30-day period following service of the complaint, the BLM decision is modified to show that the charges of the complaint are taken as admitted because the answer was not filed as required by 43 CFR 4.450-6.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge

Bernard V. Parrette
Administrative Judge
Alternate Member

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

Inasmuch as it is my belief that the State Office decision is in error as to the sufficiency of appellants' answer and also that the admitted failure of appellants to serve contestant with a copy of the answer should not, absent a showing of adverse effect upon contestant, result in the invalidation of the instant claims without a hearing, I do not believe the decision of the State Office can be sustained. Further, for reasons which I set out, infra, I believe the State Office waived the late filing of appellants' answer and that contestant has not shown that this action was wrong. Accordingly, I dissent.

Much of the argument in this case has centered around the question whether appellants timely filed an answer to the complaint. Certain facts are clear. Appellants' answer was dated October 13, 1980, so Melvin Bradshaw's statement that he believes he mailed it on October 8 is obviously of no probative value. It is also clear that the answer was due on October 15, 1980, but was not received by BLM until October 20. What is unclear, however, is when the answer was "transmitted." This is of great import since 43 CFR 4.422 allows a "grace period" of 10 days if, but only if, the officer before whom the matter is pending determines that the documents were transmitted or "probably" transmitted within the filing period. Traditionally, this determination has been based on whether the postmark indicates that the document was in transit during the period. In the instant case, recourse to the postmark is impossible since, for some unexplained reason, the State Office failed to retain the envelope. My reading of the State Office decision, however, convinces me that, for whatever reason, the State Office waived the late filing pursuant to 43 CFR 4.422.

The decision, which is admittedly no model of clarity, rejected the answer of appellant in the following language:

> The said complaint was served on the contestees on September 15, 1980, pursuant to 43 CFR 4.450-6; the contestees were allowed 30 days after service (until October 15, 1980) to file in the office where the contest is pending: 1) an answer specifically meeting and responding to the allegations of the complaint, 2) proof of service of a copy of the answer upon the contestant.
>
> The requirements of 4.450-6 were not met within the time allowed. The contestee failed to file proof of service of a copy of the complaint on the contestant by October 15, 1980. An answer to the complaint was received by this office on October 20, 1980, but by itself, does not meet the requirements of 43 CFR 4.450-6. Additionally, the answer did not specifically respond to the allegations of the complaint. The time for filing an answer has expired. Therefore, the allegations contained in the complaint are taken as admitted and the mining claims set forth therein are hereby declared null and void pursuant to 43 CFR 4.450-7(a).

This decision does not say that the answer was late and therefore not acceptable. Rather, the way I read the decision, the answer was ruled inadequate for failing to specifically deny the allegations of the complaint

and for failing to submit proof of service of the answer on the contestant. If the State Office was rejecting the answer for untimeliness, one would expect that it would expressly discuss the grace provision of 43 CFR 4.422. No reference whatsoever was made to that provision. The only logical conclusion from both what was said and what was not said in the decision is that the State Office considered the answer "transmitted or probably transmitted" within the requisite time period. Indeed, inasmuch as the State Office is required to reject an untimely answer, the late filing could only be accepted under the auspices of the grace period provisions.

While I would agree that, just as a decision refusing to grant the benefit of the grace period is appealable, a decision granting it is subject to review, the burden on this issue is on the contestant to show by a preponderance of evidence that it was not timely transmitted. I do not believe that contestant has carried its burden. 1/

Insofar as the two grounds utilized by the State Office in rejecting the answer are concerned, I think the answer clearly satisfied the requirement of specificity as interpreted by past Board decisions. See United States v. Prock, 39 IBLA 148 (1979); United States v. Libby, 24 IBLA 39 (1976).

It is admitted that appellants failed to serve a copy of their answer on the contestant. This clearly is a violation of 43 CFR 4.450-6. The question which this appeal raises is whether this omission should serve as a basis for invalidating the claims without a hearing.

In United States v. Rice, 2 IBLA 124 (1971), this Board dismissed an appeal for failure to timely serve an adverse party noting that "the appellant's dereliction imposed many administrative burdens on the Bureau and left it and the adverse party uncertain for several months as to the status of the contests. The procedural requirements of the appellate process are designed to avoid just such results." Id. at 126-27. Appellants herein have clearly created just this type of problem and thus, under Rice, it would seem that we would be justified in rejecting their appeal. Rice, however, was reversed in an unpublished decision of the United States District Court for Arizona, styled United States v. Rice, No. 72-467-PHX WEC (Feb. 1, 1974). The Court therein held that dismissal "without a showing by the adverse party of prejudice caused by the late service" was contrary to due process. (Emphasis supplied.)

There is no question but that the existence of appellants' claims and the necessary time and money which contestant is expending to litigate their

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1/ While I do not doubt that mail is normally delivered within 2 days from Delta to Salt Lake City, I think this Board has had more than sufficient exposure to miscarriages involving the Postal Service to make us somewhat leery of reliance on "normal" delivery times. See Don E. Bates, 55 IBLA 263 (1981) (express mail received 92 days after mailing); Don Chris A. Coyne, 52 IBLA 1 (1981) (mail properly addressed from Unalaska, Alaska, to Anchorage, sent via Fresno, California; Philadelphia, Pennsylvania; and Reading, Pennsylvania). Since Oct. 20, 1980, was a Monday, 1 day's delay in the normal delivery time would result in the answer arriving on Oct. 20, 1980, if the answer had been mailed on Oct. 15, 1980.

validity is prejudicial to contestant. But the test we must apply is whether the failure to serve contestant has served to prejudice its position. A review of the record indicates that contestant's attorney examined the case file on November 11, 1980, by which time the answer had been filed, and was therefore doubtless aware that an answer had been filed on October 20. I do not think that contestant has established the necessary injury during this period.

It is true, of course, that almost 2 years have elapsed since that time, during which litigation has proceeded in the Department as to the sufficiency of the answer. I have no doubt that this delay has adversely affected contestant. But this delay was occasioned not only by appellant's failure to serve contestant, but also by BLM's erroneous ruling that the answer was insufficient. Until that determination had been adjudicated on appeal the contest could not have gone forward, even had appellant properly served the contestant. Thus, this delay is not properly attributable to appellants' failure to timely serve contestant.

I recognize that appellants have shown a basic inability to follow even the simplest rules relating to the service of documents. But, when their specific failings are examined individually, I do not believe that any one rises to the level wherein we would be justified in invalidating their claims without a hearing. This Board has traditionally attempted to allow matters to proceed to adjudication on their merits, rather than resorting to procedural dismissals, where at all possible. When a private party invokes the jurisdiction of the Department to settle a private dispute, the private contestant must abide by and live with the same general concerns which animate our review of Government--initiated contests. 2/ I would allow the answer to stand and afford the appellants a hearing.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

2/ Moreover, since the basis of the private contest from Phillips Petroleum's point of view is a geothermal lease issued by the Government, the Government can scarcely be said to be a disinterested party. Thus, I feel our general approach of leniency towards procedural shortcomings, where possible, should clearly come into play.

ADMINISTRATIVE JUDGE LEWIS DISSENTING:

I disagree with the majority opinion.

As I read it, the majority opinion holds: (1) The answer to the complaint was not timely received because it was not probably transmitted during the period in which it was required to be so transmitted and therefore it did not meet the requirements of the 10-day grace period (BLM was unclear on this); (2) BLM's finding that appellant failed to serve a copy of the answer on contestant's (Phillips Petroleum Company will herein be referred to as "contestant") attorney is not affirmed or rejected; and (3) the language of the answer is legally acceptable as a denial of the complaint (BLM is reversed). The majority concludes that because the answer was late, the charges of the complaint are admitted and, implicitly, holds that the 15 mining claims named in the complaint are invalid.

Let us look at the posture of the case. Appellant in his statement of reasons on appeal asserts ownership and possession of 15 mining claims since 1965 (see Appendix for list). 1/ He further asserts that for more than 5 years, the parties (contestant and appellant) have been "contending over the contestant's attempt to dispossess the contestee [appellant] of his claims." According to appellant, he filed location notices and yearly assessment notices of work done for every year. Thus it appears he has invested time and money in the claims over a period of some 15 years. Contestant by way of a private contest filed a complaint alleging the claims were invalid. The private contest procedure allows a private person to file a complaint against another private person with the same procedural rules applying as to service, time of filing answer, etc., as if the Federal Government filed the complaint. In the present case, appellant seeks on appeal only to have an administrative hearing to determine the validity of his claims. Where there is a hearing, evidence is heard and the applicable precedents are applied to decide the validity of mining claims. Under the majority opinion, simply by the construction of the words "probably transmitted," appellant loses his claims automatically and is deprived of a hearing on the merits. My answer is that appellant should have an administrative hearing because he has met the requirements of the applicable regulation and because justice and equity demand it. My reasons are set forth below:

With respect to filing an answer to a complaint in a private contest, the regulations at 43 CFR 4.450-6, -7, and -8 provide as follows:

> § 4.450-6 Answer to complaint.
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> Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in § 4.450-5(b)(3). The answer shall contain or be

1/ This Appendix is the same as was set forth in the complaint. See attached.

> accompanied by the address to which all notices or other paper shall be sent for service upon contestee.
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> § 4.450-7 Action by Manager.
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> (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.
>
> (b) If an answer is filed and unless all parties waive a hearing, the Manager will refer the case to an administrative law judge upon determining that the elements of a private contest appear to have been established.
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> § 4.450-8 Amendment of answer.
>
> At the hearing, any allegation not denied by the answer will be considered admitted. The administrative law judge may permit the answer to be amended after due notice to other parties and an opportunity to object.

Under the above stated regulations, appellant must meet three requirements: (a) The answer to the complaint must be timely filed either during the 30 days after service of the complaint or meet the requirements of the 10-day grace period; (b) the answer must specifically meet and respond to the allegations of the complaint; and (c) with the filing of the answer, there must be proof of service on contestant. We shall take up each one in order.

(a) Timely filing of the answer is critical. It is clear that the answer, due October 15, 1980, but received October 20, 1980, was not filed within the 30 days after service of the answer. Such lateness can be waived only if the filing meets the requirements of the grace period. To meet the requirements of the grace period, the answer must be received by BLM during the 10 days after the 30 days following service (which was done here) and must have been transmitted or probably transmitted during the said 30 days and, if so, the delay in filing may be waived. The issue is: Was the answer probably transmitted during the 30 days? The regulations, 43 CFR 4.401 relating to "Appeals Procedures" and 43 CFR 4.422 relating to "Hearing Procedures," state:

> (a) Grace period for filing. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed.

The answer bears the signature of appellant with the date October 13, 1980, and shows that the signature of appellant on the answer was notarized on October 13, 1980. 2/ BLM apparently did not retain in the file the envelope showing the postmark of mail and therefore did not keep the only real evidence of when the answer was mailed. We are faced with construing the meaning of "probably transmitted." "Transmitted" means mailed. "Probably" is something short of "definite" and means, according to Webster's New Collegiate Dictionary (1979), "likely to be or become true or real." When I see that the answer was signed and notarized on October 13, 1980, I conclude that the answer was probably mailed by October 15, 1980, and that it therefore meets the requirements of the grace period and that BLM can properly waive the delay (as the regulation above permits). See United States v. Becker, 33 IBLA 301 (1978). The majority theorizes that as the usual mailing time for the United States Post Office between Delta and Salt Lake City, Utah, is 2 days, therefore, the answer, to reach Salt Lake City October 20, had to be mailed after October 15. I have recently mailed identical letters through the United States Post Office one on a Friday and one the following Monday from the same post office box to the same place and both arrived on Tuesday. This shows delivery time is variable. A delay in delivery seems especially likely when a weekend is involved. A weekend was involved in the instant case, October 18, 1980, being a Saturday, and October 19, 1980, being a Sunday. The reasoning of the majority is based on pure inference and constitutes an insufficient ground for denying an administrative hearing in the situation herein. So, I conclude that the answer was timely filed. I think my view is equally or more reasonable than the view of the majority. Further, it permits appellant to have a hearing to determine whether he should lose a valuable property right--his mining claims that he has spent money on for about 15 years. To offset the ultimate power of the Federal Government, a private citizen is entitled to fullest due process.

(b) As to whether the answer adequately denies the complaint, I think that it does but for additional reasons than those the majority relies on. The complaint requests, for lack of discovery and other various specified reasons, that Dru's Cedar Nos. 1 through 6 mining claims, Tunnel Site U MC 182394 claim, and Dru's Mill Site Nos. 1 through 8 claims, be declared null and void. In the answer, appellant asserts with detailed and lengthy discussion that the complaint should be dismissed and contestant restrained from interfering with appellant's peaceful enjoyment of his claims, and that the claims of appellant have existed since September 1, 1965, when location notices and a certificate were filed on the claims. Appellant in his answer specially asserts reasons that Dru's Cedar Nos. 1 through 6 claims, Dru's Cedar Mill Site Nos. 1 through 4, and Nos. 7 through 8 claims, and Tunnel Site claim U MC 182394 are valid. Finally, appellant denies all allegations of the complaint not specifically denied. In these circumstances I would find that the answer specifically meets and responds to the allegations of the complaint and thus constitutes a sufficient denial of the allegations ofthe complaint. United States v. Libby, 24 IBLA 39 (1976).

2/ I construe appellant's statement of reasons on appeal "that he believes the documents were both prepared and mailed the 8th of October, 1980" as simply a statement of the approximate rather than the actual date of mailing.

(c) As to the service of the answer on contestant, there seems to be no doubt that it was not served and that proof of service was not submitted to BLM as required by the regulation. In the case of failure to serve a document, I look at the injury to the party on which the answer was supposed to have been served. The file shows that on April 20, 1981, contestant wrote the BLM State Office requesting a prompt decision and mentioning that the answer to the complaint had never been served on the contestant in accordance with the regulation. There is no evidence and no assertion at any time of injury to contestant by the failure of appellant to file a copy of the answer on contestant. In contestant's comprehensive answer to the statement of reasons on appeal and the notice of appeal, there is no allegation that contestant was injured in any way by or suffered any hardship from the failure to be served. Because there is no allegation or proof of injury to the contestant because of the failure to be served, I would conclude that appellant's failure to serve a copy of the answer on contestant is not a basis for finding the answer fatally defective, and I therefore would reject this as a basis for finding that the allegations of the complaint are admitted and that the claims covered in the complaint are null and void. Brown Land Co., 17 IBLA 368, 81 I.D. 619 (1974).

In sum, I would find that the answer filed by appellant meets the requirements of 43 CFR 4.450-6. Having found that the answer was not defective, I would reverse the decision of BLM that the allegations of the complaint were taken as admitted, and the finding that mining claims are all declared null and void. Then I would turn to 43 CFR 4.450-7(b), set forth above. This states if an answer is filed and unless all parties waive a hearing (which was not done in this case), the manager will refer the case to an Administrative Law Judge upon determining that the elements of a private contest appear to have been established. Accordingly, I would refer this case to an Administrative Law Judge for a hearing on the issues. In accordance with 43 CFR 4.450-8, the Administrative Law Judge could permit the answer to be amended if appellant so wished, after due notice to other parties and an opportunity to object.

Anne Poindexter Lewis
Administrative Judge